ATTORNEY FOR APPELLANT:

A. FRANK GLEAVES III
Marion County Public Defender Agency
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

MARA McCABE
Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

ERICK MOORE,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0603-CR-192
	)	
STATE OF INDIANA,	)	
	)	
Appellee.	)	

APPEAL FROM THE MARION SUPERIOR COURT
CRIMINAL DIVISION, ROOM 2
The Honorable Robert Altice, Judge
Cause No. 49G02-0104-CF-088689

January 22, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

SULLIVAN, Judge

Appellant, Erick Moore, challenges the trial court's revocation of his probation. Upon appeal, Moore presents two issues for our review, which we restate as: (1) whether there was sufficient evidence to support the trial court's decision to revoke Moore's probation, and (2) whether the trial court erred in ordering Moore to serve the previously suspended portion of his sentence.

We affirm.

The record reveals that on April 23, 2001, Moore was charged with one count of robbery as a Class B felony. On November 7, 2001, Moore entered into a plea agreement with the State wherein he agreed to plead guilty and sentencing would be "open . . . with a cap of 15 years on executed time." App. at 50. The trial court accepted the plea agreement and sentenced Moore to ten years with four years suspended to probation.

Moore apparently completed the executed portion of his sentence before August 24, 2005, because on that date, the State filed a notice of probation violation against Moore. On September 23, 2005, an amended notice of probation violation was filed, and, following a hearing on that date, the trial court found that Moore did violate the terms of his probation and ordered that he serve seven days in jail. The trial court's leniency was apparently ineffective, however. On December 2, 2005, the State filed another notice of probation violation, alleging that Moore:

"1. ha[d] failed to report as directed to the probation department.
2. ha[d] failed to comply with substance abuse treatment.
3. ha[d] failed to comply with mental health treatment.
4. ha[d] failed to comply with anger control counseling.
5. ha[d] failed to maintain full time employment.
6. ha[d] failed to comply with GED classes." App. at 76.

On January 13, 2006, the State filed an amended notice of probation violation, adding an allegation that "on or about 12-14-05 [Moore] was arrested and charged with Resisting Law Enforcement/MA under cause number 49-F08-0512-CM-215875." App. at 77. On January 13, 2006, the trial court held a hearing during which Moore denied the allegations. The trial court then set the matter for a contested hearing to be held on February 3, 2006.

At the February 3 hearing, Sara Bunner, Moore's probation officer, testified that Moore had failed to report to the probation department as directed. Indeed, Ms. Bunner testified that since being found in violation of the terms of his probation on September 23, 2005, Moore had reported only once. Ms. Bunner also testified that Moore had been convicted of the resisting law enforcement charge which was mentioned in the January 13, 2006 amended notice of probation violation. The State also entered into evidence a copy of the judgment showing that Moore had been convicted of resisting law enforcement on January 18, 2006.[1] Moore presented no evidence.

At the conclusion of the hearing, the trial court found that Moore was in violation of the terms of his probation by "failing to report to probation as directed and by being convicted of a new charge of resisting law enforcement . . . ." Tr. at 13. The trial court then ordered that Moore serve the previously suspended four-year portion of his sentence. Moore filed a notice of appeal on March 3, 2006.

[1] Ms. Bunner further testified that there were also pending charges of D felony robbery, B felony criminal confinement, B felony possession of a firearm by a serious violent felon, and two counts of possession of a handgun, one as a Class C felony and the other as a Class A misdemeanor. The State had not amended the notice of probation violation to allege the commission of these crimes as additional probation violations, however.

Upon appeal, Moore first claims that the evidence was insufficient to support the trial court's finding that he violated the terms of his probation. In reviewing this claim, we are mindful that a defendant is not entitled to probation; instead, such placement is a matter of grace and a conditional liberty that is a favor, not a right. Brabandt v. State, 797 N.E.2d 855, 860 (Ind. Ct. App. 2003). Upon a finding that a probationer has violated a condition of probation, a court may: (1) continue probation, with or without modifying or enlarging the conditions, (2) extend probation for not more than one year beyond the original probationary period, or (3) order execution of all or a part of the initial sentence that was suspended. Id. (citing Ind. Code § 35-38-2-3).[2] Further, the decision whether to revoke probation is a matter within the sound discretion of the trial court. Id. A probation revocation hearing is civil in nature, and the State need only prove the alleged violations by a preponderance of the evidence. Id. Violation of a single condition of probation may be sufficient to revoke probation. Id. at 860-61. Upon appeal, we consider only the evidence favorable to the judgment, and we neither reweigh that evidence nor judge witness credibility. Id. at 861. If there is substantial evidence of probative value to support the trial court's conclusion that a defendant has violated any terms of probation, we will affirm its decision to revoke probation. Id.

Moore claims that there was no evidence that he was the individual who committed the acts which formed the basis for the revocation of his probation. In other words, he claims that the State presented no evidence that he was the Erick Moore who

[2] Effective July 1, 2005, the statute was amended to permit the court to order less than all of the originally suspended sentence to be served.

failed to report to probation and who was convicted of resisting law enforcement. We disagree. Ms. Bunner, who testified that she was familiar with Moore's case, testified that Moore had been convicted of resisting law enforcement and the State supported this testimony by admitting into evidence the judgment of conviction. This judgment shows that an individual named "Erick Moore," spelled just as the defendant in this case spells his name, had been convicted of resisting law enforcement. State's Exhibit 1. More importantly, in arguing for leniency, Moore's counsel explained to the trial court:

> "We would just ask the Court to consider giving Mr. Moore three years instead of the four years executed on the violation. *He understands and has not denied that he was, in fact, convicted of that resisting law enforcement.* That was apparently after a bench trial, it was not a plea agreement, so *he did – and still does maintain that he was not actually resisting, but he was found guilty. He understands that that's a violation of probation.*" Tr. at 13. (emphasis supplied).

Thus, Moore admitted to the trial court that he was the individual who had been found guilty of resisting law enforcement. This admission was sufficient to support a finding that Moore had violated the terms of his probation. As noted, a finding of a violation of a condition of probation will support a revocation of probation. See Brabandt, 797 N.E.2d at 860-61.

Moore also claims that the trial court erred in ordering that he be incarcerated for the previously suspended four-year portion of his sentence. Moore asks us to exercise our review of sentences under Appellate Rule 7(B) and conclude that his "sentence" is inappropriate given the nature of the offense and the character of the offender. Moore's argument is based upon the mistaken assumption that his sentence is punishment for his probation violations. To the contrary, his sentence is a result of his having pleaded guilty

to a Class B felony. We do not review a trial court's decision to order a defendant to serve his previously suspended sentence under Appellate Rule 7(B), but instead review such a decision only for an abuse of discretion. Sanders v. State, 825 N.E.2d 952, 956-57 (Ind. Ct. App. 2005), trans. denied; Johnson v. State, 692 N.E.2d 485, 488 (Ind. Ct. App. 1998) (referring to former Appellate Rule 17(B)). Here, Moore had already violated the terms of his probation once, and after the trial court treated Moore with relative leniency (requiring Moore to serve only seven days in jail before re-releasing him to probation), Moore reported to probation only one time and was convicted of an additional criminal offense. Given these circumstances, despite the statutory amendment of 2005, we cannot say that the trial court abused its discretion in ordering the execution of the previously suspended four-year portion of his sentence.[3]

The judgment of the trial court is affirmed.

ROBB, J., and BARNES, J., concur.

[3] To the extent that Moore is challenging his sentence under the plea agreement, this is not the proper forum. See Sanders, 825 N.E.2d at 956 (noting that a defendant may not collaterally challenge his sentence upon an appeal from the revocation of his probation).